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IN THE
Supreme Court of the United States

October Term, 1939

No.. **270**....

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF
THE WILL OF GEORGE A. BOLLES, DE-
CEASED,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO**

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*To the Honorable Chief Justice of the United States
and the Associate Justices of the Supreme Court
of the United States:*

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF MATTER INVOLVED

It is the contention of petitioner in this case that the Supreme Court of Ohio has denied petitioner due process of law by depriving her of the benefit of, and of any

opportunity to be heard with respect to her rights under an express trust and a constructive trust, which had been held by the Court of Common Pleas (R. 55 to 63) and the Court of Appeals (R. 340 to 346) to exist in her favor with respect to property having an appraised value of approximately \$213,000.00 (R. 75).

Stated very briefly, this results from the court's holding that a prior Probate Court proceeding is *res judicata* of issues not raised in the Probate Court and of which the Probate Court under the law as it stood prior to the present decision had no jurisdiction.

This is a suit in equity in which the Supreme Court of Ohio (without passing upon the merits) reversed the above mentioned decisions of the lower Ohio courts in petitioner's favor (which were on purely *equitable* issues), and entered final judgment against petitioner solely on the respondent-executor's claim of *res judicata* based on an earlier proceeding on exceptions filed by petitioner in the Probate Court to the respondent-executor's inventory, which exceptions (and amended exceptions filed in the Court of Common Pleas) *presented only questions of legal title*. Petitioner did not even attempt to raise, on the exceptions in the former proceeding, any question of equitable right or title based upon the trust issues now relied upon by her, because prior to the decision of the Supreme Court herein, it was the settled law of Ohio that the Probate Court (and the Court of Common Pleas on appeal) had no jurisdiction to hear and determine such equitable issues on exceptions to an executor's inventory.

In her original and amended exceptions to the inventory in the former proceeding, petitioner asserted that

she had become the owner of the full legal title to the property prior to her husband's death by reason of a gift *inter vivos*, and that the executor had *no* right to or interest in the property. She lost on this claim on the executor's appeal to the Supreme Court, which held that the question before it was only whether a valid gift *inter vivos* of the legal title had been made and that the exceptions must be overruled because the evidence as to delivery of the property to her during her husband's lifetime was insufficient to sustain the claim that *legal* title had thereby passed to her. See *Bolles vs. Toledo Trust Company*, 132 O. S. 21, 4 N. E. (2d) 917.

Thereafter, petitioner filed the present suit in equity in the Court of Common Pleas, which is a court of general equity jurisdiction, and herein asserted in accordance with the decision of the Supreme Court in the former case, that legal title to the property had passed to the executor, but further alleged that it so passed subject to an express trust in favor of plaintiff established by her husband in his lifetime, and, in the alternative, that if there were no express trust actually established, that her husband had attempted to establish one and died in the belief that he had done so and that under all of the circumstances a constructive trust should be impressed upon the property in order to avoid the unjust enrichment of the executor as such and as trustee for petitioner's minor daughter, substantially the sole beneficiary under her husband's will.* See *Crooks vs. Crooks*,

* The will provided only a life income for petitioner of \$500.00 per month and the will and trust instruments under which the executor is trustee set up trusts covering property not here in issue of a value of over \$500,000 for the daughter. The lower courts held the evidence shows without dispute that Mr. Bolles never intended the properties here involved to go under his will.

34 O. S. 610 (1878). holding a constructive trust arises under such circumstances, cited with approval in *Streeper vs. Myers*, 132 O. S. 322 (1937). The respondent-executor denied petitioner's claims and also pleaded the decision in the former case as *res judicata*.

The Court of Common Pleas and the Court of Appeals (where under Ohio practice, this case, being a chancery case, was tried *de novo*), both held in favor of petitioner on all issues, that is, that in their judgment the express trust was established and that in the alternative a constructive trust should be impressed upon the property, and that the finding in the former proceeding was not *res judicata*.

The Supreme Court of Ohio (Judge Hart dissenting) reversed and entered final judgment herein against petitioner. The syllabus of the case, which in Ohio states the law of the case, reads as follows:

"A final adjudication, that certain inventoried personal property is assets of a decedent's estate and lawfully included in the inventory thereof in a proceeding instituted in Probate Court by filing exceptions to the inventory, is *res judicata* when properly pleaded as a defense in a subsequent action brought by the person, who in the former proceeding was exceptor, to engraft a trust for his use and benefit upon the same personal property." (136 O. S. 517.)

The court in its *opinion* wholly ignores petitioner's alternative claim and decree of the Court of Appeals of constructive trust, but its *judgment* (based solely on *res judicata*) orders the dismissal of petitioner's suit, thus finally disposing of petitioner's claim of constructive trust, as well as her claim of express trust. Neither

opinion nor judgment deals with the merits of petitioner's claim of express or constructive trust.

As the constitutional question here presented first arose upon the filing of the Supreme Court's opinion, petitioner first raised it by application for rehearing in that court. Rehearing was denied without further opinion.

II

STATEMENT DISCLOSING BASIS OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

The judgment herein sought to be reviewed is a final judgment of the highest court of the State of Ohio dismissing both causes of action in petitioner's petition. Petitioner claims here, and by her application for rehearing in the Supreme Court of Ohio, there claimed, a right under the Fourteenth Amendment to the Constitution of the United States to an opportunity for hearing of her equitable claims herein asserted. Such claim was denied by the Supreme Court of Ohio by its action in denying petitioner's application for rehearing and adhering to its judgment dismissing both her causes of action without consideration of the merits.

The jurisdiction of this court is sustained by Section 344(b), Title 28, United States Code (Judicial Code Section 237, as amended).

The judgment of the Supreme Court of Ohio was entered April 24, 1940, application for rehearing was filed therein within rule on May 8, 1940, and denied on May 29, 1940.

It is petitioner's contention that the decision below has retroactively enlarged the jurisdiction of the Probate Court of Ohio and thereby retroactively imposed on petitioner a duty to have proceeded in Probate Court in a way contrary to the law as it existed under then controlling Ohio decisions, when there was still an opportunity for her to have so proceeded therein, and in other respects retroactively changed the law as hereinafter set forth in a manner which has deprived petitioner of her constitutional right to an opportunity for hearing on the merits of her claim.

(a) She could *not* have had such hearing in the Probate Court in the former proceeding because under the decisions of the Supreme Court of Ohio then in effect the Probate Court then had no jurisdiction thereof, and

(b) She is *denied* such hearing herein on the ground that she should have submitted her equitable rights to the (then jurisdictionless) Probate Court in the former proceeding, and

(c) Not only the jurisdiction of the Probate Court, but also the rules as to what constitutes *res judicata* were retroactively changed (as to the petitioner) by the present decision in a manner which imposes on her a duty to have asserted her equitable rights in the Probate Court although no such duty existed under the law of Ohio when her exceptions were filed and heard, and bars her from any consideration of the merits of her claims because she did not do so.

It is believed that the jurisdiction of this court is sustained by *Brinkerhoff-Paris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673, and *Herndon vs. Georgia*, 295 U. S. 441.

III

THE QUESTIONS PRESENTED

1. Is a decision of a state court of last resort which denies a party any hearing and any opportunity for a hearing on the merits of his cause of action a violation of his rights under the Fourteenth Amendment?

2. Has the Supreme Court of Ohio by its decision herein denied the petitioner any opportunity for a hearing on the merits of her equitable claims?

3. Did the Probate Court at the time petitioner's former proceeding was pending therein have jurisdiction in that proceeding to hear and determine the merits of either of her equitable claims?

(a) Was the Probate Court a court having the necessary equitable jurisdiction to hear and determine such claims?

(b) Did the Probate Court on exceptions to the inventory have jurisdiction to hear and determine such equitable questions?

4. At the time petitioner's former proceedings were pending in Probate Court was it her duty under the law of Ohio to attempt to support her exceptions by the assertion of her equitable rights and title, as well as by assertion of her legal rights?

5. Has the Supreme Court of Ohio, by its decision herein, retroactively imposed upon petitioner a duty to have asserted her equitable rights in support of her exceptions in Probate Court and barred her from relief because she did not perform that then non-existent duty?

6. Was the raising of the Federal question on application for rehearing in the Supreme Court timely?

IV

**REASONS RELIED UPON FOR THE ALLOWANCE
OF THE WRIT**

The Supreme Court of Ohio has decided a Federal question of substance (hereinbefore stated) in a way probably not in accord with applicable decisions of this court.

Rule 38, U. S. Supreme Court;
*Brinkerhoff-Faris Trust & Savings Com-
pany vs. Hill, Treasurer*, 281 U. S. 673;
Herndon vs. Georgia, 295 U. S. 441.

The Federal question was properly raised in the state Supreme Court on motion for rehearing (which was denied without opinion or mention of the Federal question) as the question did not arise until the decision of that court.

*Brinkerhoff-Faris Trust & Savings Com-
pany vs. Hill, Treasurer*, 281 U. S. 673;
Herndon vs. Georgia, 295 U. S. 441 (opinion
of court and dissenting opinion).

The Supreme Court of Ohio erred, and denied petitioner due process of law, in holding that petitioner is barred from enforcing her equitable rights in this proceeding because she did not attempt in the former proceeding to enforce them in a way (*i.e.*, by exceptions to the inventory) in which they were unenforceable under the decisions of that court in effect at the time that way

was still open to petitioner, thereby forever depriving petitioner of her equitable rights without hearing.

Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer, 281 U. S. 673, *supra*.

Herndon vs. Georgia, 295 U. S. 441.

The Supreme Court of Ohio further erred and denied petitioner due process of law, in that its decision retroactively changed the law of Ohio so as to treat a claim of legal title, and a claim of equitable title or right, merely as separate grounds supporting one cause of action, instead of treating them as had always theretofore been the law of Ohio, as separate claims or causes of action, and thereby retroactively imposed upon petitioner the duty to plead her equitable rights in addition to her legal rights on exceptions to the inventory and deprived her of her equitable rights without hearing because she failed to anticipate that the law would thus be changed and thus further denied her due process of law.

The Supreme Court of Ohio further erred and denied petitioner due process of law, in that its decision retroactively denied to petitioner the right which was hers under the decisions of that court in effect at the time her exceptions were filed and heard, first, to assert her supposed legal rights by the remedy of exceptions to the inventory, and failing in that (by reason of the non-existence of the supposed legal right) then to assert her equitable rights by the remedy of a suit in equity, and thereby deprived petitioner of her equitable rights, without hearing, because she failed to anticipate that the law would thus be changed.

V

PRAYER

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Ohio, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings therein, and that the judgment and decree of the Supreme Court of Ohio be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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